

No. 2818

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

MARY KALEIALII et al.,	}
<i>Plaintiffs in Error,</i>	
VS.	
HENRIETTA SULLIVAN et al.,	
<i>Defendants in Error.</i>	

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

S. H. DERBY,
Of Counsel for Defendants in Error.

Filed this.....day of October, 1916.

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

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On the trial of the above cause a point was made of the fact that the plaintiff, Mary Kaleialii, and Robert Boyd, the father of the other plaintiffs, were illegitimate, as bearing on the construction of the deed here in question (Tr. 34, 86-87). This point, however, was *expressly* left undecided when the case first went to the Hawaiian Supreme Court on reserved questions of law (Tr. 34), and seems to have thereafter been lost sight of. On the return of the case to the lower court, that court decided that the decision on the reserved questions was decisive of the case and, for that reason, ordered judgment for defendants (Tr. 63). No special findings were

either asked for or made nor are such findings either required or usual in Hawaii.

Waialua Agricultural Co. v. Oahu Ry. & Land Co., 18 Haw. 81, 87;

Yee Chin et al. v. Yuen Kau, 18 Haw. 427.

If the case had been tried in a federal court, it is obvious that the foregoing facts would have prevented any review of the question of whether the decision was supported by the evidence.

Dunsmuir v. Scott, 217 Fed. 200.

The question here may be broader in view of the fact that this court is reviewing a decision of a *territorial* court, but certainly this court has only the same legal powers in the premises that the Supreme Court of Hawaii had when it finally affirmed the judgment of the trial court (Tr. 148). And the rule is absolutely settled in Hawaii that the decision of the trial court in a jury-waived case has the same effect as a verdict of the jury and cannot be reversed if there is *any* evidence, beyond a scintilla, in support of it.

In the Matter of Lewers & Cooke, Ltd., 19 Haw. 334, 335;

Kong Kee v. Kahalekou, 5 Haw. 548;

Laing v. Laing, 10 Haw. 183, 184;

Ah Quai v. Puuki, 11 Haw. 158, 159;

Hoffman v. Bailey, 11 Haw. 669.

Hence, if *any* evidence supports said decision in this case, it *must* be affirmed.

We believe that we have clearly shown in our main brief that the construction given to the deed of Alex-

ander Adams, Jr., to Peke and Maria is correct. Even if it be admitted, however, that Peke only took a life estate under that deed, the claim that Mary Kaleialii and Robert Boyd took the remainder under the word "children" in the deed depends on their being *legitimate children*, for that word does not (except under special circumstances not appearing in this case) include illegitimates, as a mere reference to the encyclopaedias will show.

5 Encyc. Law, 2 ed., 1095, and cases there cited;
7 Cyc. 125, and cases there cited.

In Volume II of Underhill on Wills, Sec. 570, the learned author says:

"In the absence of evidence of a contrary intention it is conclusively settled that only legitimate children are entitled to take under a provision giving property to children *simpliciter*. Whatever the word may be indicating kindred, whether children, issue, descendants, sons, or daughters, it will be generally taken to include only those persons who are legitimate children, issue, etc. It is as though the word 'legitimate' were written in the will before the word 'children', 'sons', 'issue', etc. This rule of construction is based upon the maxim of the civil law, '*Qui ex damnato coitu nascuntur, inter liberos non computentur*'; and although natural children who have acquired the reputation of being the children of the testator, or of the person mentioned in the will, prior to the date of its execution, may, under some circumstances, be capable of taking under the description of children, yet they are not permitted to take upon mere conjecture of intention. There must be either an *express designation of children as illegitimate children*, or there must be such necessary implication of an in-

tention that they shall take that no doubt shall remain that the testator intended them to take as children.”

See also *id.* § 571.

The same rule applies in Hawaii.

Machado v. Kualau, 20 Haw. 722.

In the case at bar we contend that the evidence conclusively shows that Mary Kaleialii and Robert Boyd were illegitimate. Although Peke was married to a man named Stone, the father of Mary and Robert was a man known as Ed. Boyd. Mary Kaleialii expressly admits this in her testimony (Tr. 79, 86, 87, 88) and, while her counsel tried to show that her evidence was based on hearsay, it is very convincing, especially when coming from one of the plaintiffs in regard to her own father. Mary never saw or knew Mr. Stone (Tr. 86-87), and testified that, at the time of Robert's birth, he had been away a long time (Tr. 87-88), and she admitted that both she and Robert were always known as Boyd and not Stone (Tr. 86). She was married as Mary Boyd (*id.*), and the birth records of the Board of Health in regard to Robert, under his native name of Napunako (Tr. 110), show that his father was Edwin Boyd (Tr. 111), who was not Peke's husband (Tr. 86-87). In fact, Robert's children are here suing under the name of *Boyd*. There is some other evidence of illegitimacy (Tr. 126, 128, 131), including numerous admissions by Mary Kaleialii that Ed. Boyd was her father (Tr. 126). *There is no evidence to the contrary.*

It is not necessary, however, to claim that the evidence conclusively shows illegitimacy, but simply that

there is *some* evidence to that effect, as the decision cannot in such case be disturbed. And, such being the case, the plaintiffs in error have no claim under the deed from Alexander Adams, Jr., in any event, because, even if Peke only took a life estate, the property would go at her death to the heirs of said Alexander Adams, Jr. (Tr. 14), and it is settled law in Hawaii that illegitimates cannot inherit from their grandfather and are not his "heirs".

Machado v. Kualau, 20 Haw. 722.

Hence plaintiffs (even if their strained construction of the deed should prevail) have no right to oust those who, in good faith, have dwelt on the property for thirty years and put up substantial improvements, while plaintiffs stood by and failed to disclose their claims. In fact, under the circumstances, the action of the plaintiffs is almost brazen and subversive of the first principles of justice.

Dated, San Francisco,
October 23, 1916.

S. H. DERBY,
Of Counsel for Defendants in Error.

